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Issue Date: 16 December 2003

CASE NO.: 2003-LHC-2183
OWCP NO.: 6-189632

In the Matter of:

ILENE MANZO,
Claimant,

v.

CARNIVAL CRUISE LINES, INC.,
Employer,

and

ZURICH NORTH AMERICA,
Carrier.

ORDER DENYING MOTIONS FOR RECONSIDERATION AND DISMISSAL AND REMANDING CLAIM FOR FURTHER PROCEEDINGS

On November 20, 2003, counsel for Carnival Corporation ("Employer" or "Carnival") and Zurich North America ("Carrier" or "Zurich") filed via facsimile a motion seeking reconsideration of my denial of a continuance of the formal hearing in this matter held on October 21, 2003 in Orlando, Florida. Employer and Carrier also filed that same date via facsimile a motion to dismiss in which they assert that Ilene A. Manzo ("Claimant" or "Manzo") is estopped from receiving benefits in this case because she filed for, and is receiving, state workers compensation benefits in Florida. On November 20, 2003, counsel for Claimant filed a response to the motion for reconsideration. No response to the motion to dismiss has been received. For the following reasons, Employer's and Carrier's motions will be denied, and the claim will be remanded for further proceedings.

Procedural History

On June 26, 2003, the district director referred this matter to the Office of Administrative Law Judges ("OALJ") for formal hearing under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901, *et seq*. ("Act" or "LHWCA").

On July 9, 2003, I issued a Notice of Hearing and Prehearing Order scheduling this matter for formal hearing in Orlando, Florida on October 21, 2003.

On October 3, 2003, Lisa Torron-Bautista filed a notice of appearance as counsel for Employer and Carrier.

On October 13, 2003, Ms. Torron-Bautista submitted to OALJ copies of a letter to Claimant's attorney and a proposed motion for continuance. That same day, Claimant's attorney submitted a response opposing a continuance of the formal hearing.

On October 14, 2003, Employer and Carrier filed with OALJ a "Pre-Hearing Statement" (Form LS-18) and a motion to dismiss based on Claimant's receipt of workers compensation benefits from the State of Florida.

On October 15, 2003, a telephone conference was held to consider the motions filed the prior day by Employer and Carrier. Claimant was represented by attorney John M. Schwartz, and Employer was represented by attorney Rob Griffis. The motion to continue was denied, and a ruling on the motion to dismiss was withheld pending the submission of testimony and further argument at the formal hearing.

On October 16, 2003, Claimant filed a prehearing stipulation form, witness list, and list of exhibits. Employer's attorney filed witness and exhibit lists that same day.

On October 21, 2003, a formal hearing in this matter was conducted in the Orange County Courthouse in Orlando, Florida. Claimant's Exhibits ("CX") 1 through 3 were offered into evidence and were admitted into the record. Claimant also appeared and testified. Employer's and Carrier's Exhibits ("EX") 1 through 5 were offered into evidence. EX 1 through 4 were admitted into the record, having been created by or previously produced to Claimant in the state proceeding, while EX 5 was excluded based on Employer's and Carrier's failure to comply with the discovery provisions of the July 9, 2003 prehearing order in this case. The testimony of two witnesses offered by Employer and Carrier was excluded for the same reason. At the close of the hearing, counsel for Employer and Carrier was informed that she would be permitted to file, within thirty days from the date of the hearing, a motion to dismiss accompanied by affidavits which might support a finding that Employer's and Carrier's failure to comply with the discovery deadlines established in the prehearing order should be excused for good cause.

1. Motion for Reconsideration.

Employer and Carrier seek reconsideration of my denial of their request for a continuance of the formal hearing held in Orlando on October 21, 2003 based on "excusable neglect in failing to respond to . . . [Manzo's] claims for benefits . . . ." Motion for Reconsideration of Continuance (hereinafter "Mot. for Recon.") at 1. In support of their motion, Employer and Carrier assert that: the notice of claim filed by Claimant went only to Employer; at the time Employer received notice of the Longshore claim, Claimant was simultaneously pursuing a claim for state workers compensation benefits; Employer "assumed that the pleadings [in the Longshore claim] were part of the state claim and [it] was being handled by the Carrier;" and "[j]ust before trial in the Longshore claim, the Employer realized that the [Claimant] had filed

both a state and federal claim for the same benefits." *Id*. at 3-4. Employer and Carrier also assert:

> As further background, the Employer assumed that because the Employee was seeking state benefits it was her exclusive remedy in this matter. Florida Statute § 440.09(2) state (sic) that a state "Claimant" cannot pursue both state and federal benefits contemporaneously. Knowing about the exclusive remedy for the Employee the Employer did not scrutinize the federal pleadings when they were served on the Employer alone. We cannot hold the Employer to a level of knowledge that only a trained legal professional would possess.

Id. at 4.

Formal hearings in LHWCA cases are initiated by transmitting to OALJ the pre-hearing statement forms submitted to the district director by the parties, accompanied by a letter of transmittal from the district director. 20 C.F.R. § 702.331 (2003). Applicable regulations require that parties be notified of the place and time of the formal hearing not less than 30 days in advance thereof. 20 C.F.R. § 702.335 (2003). "The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned to the case." 20 C.F.R. § 702.333 (a) (2003).

As noted above, the district director's transmittal letter referring this case to OALJ for a formal hearing was received and docketed June 26, 2003. Attached to the transmittal letter was Claimant's pre-hearing statement dated May 22, 2003 which, by regulation, was required to be served by Claimant on "all other parties." 20 C.F.R. § 702.317 (2003). In addition to identifying Ilene A. Manzo as the claimant in this proceeding, the transmittal letter identified Carnival as the responsible employer and listed an address which counsel for Employer has acknowledged is Carnival's corporate headquarters in Miami, Florida. The notice of hearing and prehearing order issued by me on July 9, 2003 was sent to Carnival, the named employer, at the same address. The notice was issued more than 30 days before the October 21, 2003 hearing. Carnival thus clearly had adequate notice of the formal hearing in compliance with applicable regulations.

The prehearing order issued by me on July 9, 2003 established deadlines by which all discovery was to be completed and witness and exhibit lists were to be exchanged with opposing counsel and filed with the Court. All discovery was to be completed by the parties thirty days before the date of the hearing, *i.e.*, by September 22, 2003. By the time Ms. Torron-Bautista entered her appearance in this case on October 3, 2003, those deadlines had passed.

Paragraph nine of the prehearing order further informed the parties that:

> This notice of hearing and pre-hearing order is being sent to the parties and their counsel as identified by the District Director on the service sheet and any other supplemental information in the file. *All persons served should check the service sheet to ensure that the proper parties have been served. Any errors should be brought to my attention as soon as possible.*

(italics added). Despite this admonition, Carnival failed to inform me that Zurich was the responsible carrier with respect to the claim for benefits filed by Claimant under the LHWCA.

During the October 15, 2003 telephone hearing on the pending motions, when asked to explain why Employer and Carrier were so late in obtaining counsel in the case, the only explanation their attorney could offer was that Carrier's adjuster knew of the payment to Claimant of state benefits and did not believe "that the Claimant in any way fit under the definition of what a Longshoreman [is] or [that she] conducted any marine activity, so she assumed it was a State claim" (Tr. 6). According to Claimant's attorney, he had spoken with the adjuster and "[e]veryone was well aware of the Longshore [claim] long before they ever made an appearance in this case" (Tr. 7). Claimant's counsel further noted that, with respect to the Longshore claim: he had served discovery requests on Carnival on August 14, 2003; those discovery requests were served via certified mail; and Carnival had failed to respond (Tr. 9-10). After hearing arguments from the parties, I denied the motion to continue and withheld ruling on the motion to dismiss pending the submission of testimony and further argument at the formal hearing (Tr. 16-17).

At the October 21, 2003 formal hearing, Ms. Torron-Bautista and Mr. Griffis acknowledged that the address to which the notice of hearing and prehearing order was sent was Employer's corporate headquarters in Miami. Counsel stated, however, that they had not yet been able to verify whether Carnival received the notice of hearing issued by me on July 9, 2003, despite my request that counsel inquire into this matter before the hearing (Tr. 7-8). Mr. Griffis stated that Carrier's adjuster was "not specifically experienced in the Longshore Act whatsoever," and he assumed "she didn't recognize what she should . . . respond to the Longshore [notice]" (Tr. 8.) Counsel identified the adjuster as "Desiree Tolbert" and stated that she was "the adjuster for Zurich . . . handling the State claim" (Tr. 9). Counsel could not explain why Carnival failed to respond to Claimant's discovery requests or neglected to contact its carrier or counsel prior to October 3, 2003 when Ms. Torron-Bautista entered her appearance in this case (Tr. 30).

Claimant's attorney produced at the hearing a copy of a "Notice to Employer and Insurance Carrier that Claim has Been Filed" (Form LS-215a) dated November 15, 2002 sent to "Carnival Corp., 3655 Northwest 87 Ave., Miami, FL 33178" (CX 2). The notice bears the OWCP number in this case, relates to an injury occurring on May 23, 2002, and reflects that copies were also sent to Claimant and her attorney. *Ibid*. In addition, Claimant's counsel introduced a copy of requests for admission served on Employer via certified mail at its Miami headquarters (CX 3; Tr. 11-12). Accompanying the request for admissions was a "Domestic Return Receipt" form reflecting receipt by Nestor Salgado of Carnival Cruise Line on August 14, 2002. *Ibid*. Claimant's counsel further stated that, approximately six weeks prior to the hearing, his paralegal informed him about a conversation with Zurich's adjuster during which the adjuster stated that she had decided "they" were going to cease paying state benefits to Claimant "since

[Claimant had] filed to have a hearing in the Longshore claim . . . ." (Tr. 10).[1] Claimant's attorney also noted that "[Carnival and Zurich] have gone to hearings trying to get the State Comp claim dismissed on the basis of the fact that I have filed the Longshore claim." *Ibid*.

As noted above, Carnival and Zurich have filed motions to reconsider and to dismiss in this case. Attached to Employer's and Carrier's motion to dismiss was an affidavit executed November 20, 2003 by Liliana Palenzuela ("Palenzuela Aff.") who identified herself only as someone who was "in the risk management department for Carnival Cruise Lines of Miami, FL." Palenzuela Aff. ¶ 1. The remainder of the affidavit states, in its entirety:

> 2. As part of my job duties, I am required to process legal paperwork and assign to the carrier responsible for defending the matter.
>
> 3. In this matter, Ms. Manzo had a litigated State Workers' Compensation Claim which we were receiving voluminous correspondence on. When the claimant filed a Longshore Claim with the same attorney in the same law firm, it was accidentally filed with the state claims as they were currently being litigated. Therefore, we did not discover that a separate Longshore Claim had been made in this matter until October 13, 2003 when we received the Pre-Trial Stipulation from opposing counsel in this matter.

Palenzuela Aff. at ¶¶ 2-3.

The Palenzuela affidavit is devoid of any reference to Desiree Tolbert, the individual identified by counsel for Employer and Carrier as the adjuster working for Zurich who was responsible for Manzo's state claim (Tr. 9). Similarly, the affidavit makes no mention of Nestor Salgado, the August 14, 2003 recipient of Claimant's certified mailing of discovery requests to Carnival (CX 3, Tr. 11-12). Furthermore, the assertion that "we did not discover that a separate Longshore Claim had been made in this matter until October 13, 2003 when we received the Pre-Trial Stipulation from opposing counsel in this matter" is patently contradicted by counsel's admissions during the formal hearing that on August 19, 2003, Carnival and Zurich moved to dismiss the state claim *because of the Longshore claim filed by Manzo* (Tr. 30-31). The affidavit therefore is accorded little weight.

Based on the foregoing, it is clear that both Carnival *and* Zurich have long been aware of the pendency of this proceeding. Employer was first served with notice of the Longshore claim on November 15, 2002, and a copy of the district director's letter referring the claim to OALJ was sent to it on June 26, 2003. Carnival was also served with a copy of the July 9, 2003 notice of hearing and prehearing order, and on August 14, 2003 it received via certified mail Claimant's

[1] Mr. Griffis noted that he filed on behalf of Zurich a motion to dismiss the state claim on August 19, 2003, and argued that "at least at that point [Claimant's attorney] should have been aware . . . that the carrier was angry about having both the Longshore and State claims." (Tr. 30-31). Claimant's attorney noted, however, that, despite Zurich's knowledge of the Longshore proceeding, and Mr. Schwartz's representation of Ms. Manzo in this case, "there was no word mentioned to me about the fact they were going to represent them in the Longshore claim, that Zurich was involved in the Longshore claim." (Tr. 31).

discovery requests in this case. Furthermore, Desiree Tolbert, Zurich's adjuster, spoke at least once to a paralegal in the office of Claimant's attorney and was "angry about having both the Longshore and State claims" (Tr. 30-31). Counsel for Employer and Carrier thereafter filed a motion to dismiss the state claim on August 19, 2003. *Ibid*. Despite their clear knowledge of its existence, neither Carnival nor Zurich took any action to defend against this claim until Ms. Torron-Bautista filed her notice of appearance on their behalf approximately two weeks before the formal hearing set for October 21, 2003. Employer's and Carrier's conduct, as explained below, does not amount to excusable neglect.

The rules of practice and procedure governing proceedings before OALJ provide that the Rules of Civil Procedure for the District Courts of the United States shall be applied when a situation not provided for or controlled by OALJ's rules occurs. 29 C.F.R. § 18.1(a) (2003). Since OALJ's rules do not address the situation presented here (Employer's and Carrier's request that they be excused from complying with the discovery deadlines established in my prehearing order due to excusable neglect), the Federal Rules of Civil Procedure apply.

According to Rule 6, whenever an act is required by order of court to be done at or within a specified time, "the court for cause shown may . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . ." F. R. Civ. P. 6(b)(2). Similarly, according to Rule 60, "the court may relieve a party or a party's legal representative from a[n] . . . order . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . ." F. R. Civ. P. 60(b)(1). Neither rule, however, defines the term "excusable neglect."

In *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership*, 207 U.S. 380 (1993), the Supreme Court considered the meaning of "excusable neglect" in the context of Bankruptcy Rule 9006(b)(1). In doing so, the Court noted that the bankruptcy rule was patterned after Rule 6(b). *Id*. at 391. The Court wrote:

> Under Rule 6(b), where the specified period for the performance of an act has elapsed, a district court may enlarge the period and permit the tardy act where the omission is the "result of excusable neglect." As with [Bankruptcy] Rule 9006(b)(1), there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, then, that in applying Rule 6(b), the Courts of Appeals have generally recognized that "excusable neglect" may extend to inadvertent delays. Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant.

Id. at 391-92. The Court took similar note of the "excusable neglect" provision of Rule 60(b)(1) and stated that the "neglect" portion of such provision was "understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id*. at 393-94. With respect to the Rule's requirement that the party's neglect be "excusable," the Court wrote:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [adversary], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395. The United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this claim arises, has employed this same standard in assessing claims of "excusable neglect" arising under the Federal Rules of Civil Procedure. *Advanced Estimating System,* Inc. v. *Riney*, 77 F.3d 1322 (11th Cir. 1996); *Cheney v. Anchor Glass Container Corp*., 71 F.3d 848 (11th Cir. 1996).

Although Employer and Carrier suggest that this case simply "fell through the cracks" because it was mishandled by employees who had no legal training, were unfamiliar with Longshore claims, and may have somehow mistakenly believed that pleadings in this case were part of the state workers compensation claim, that explanation is simply not credible. Notice of the Longshore claim was initially served on Carnival on November 15, 2002, nearly a full year before the case proceeded to a formal hearing. That document clearly identified the proceeding as one before the United States Department of Labor, Office of Workers' Compensation Programs, not the State of Florida. Further notice of the proceeding was given to Carnival on June 26, July 9, and August 19, 2003, respectively, when the case was transferred by the district director to OALJ, when it was thereafter set for hearing, and when Claimant served on Carnival her discovery requests. Those documents also clearly identified this matter as a case before the United States Department of Labor involving a claim under the LHWCA. Furthermore, Zurich, the party identified by Carnival as the responsible carrier in this case, was clearly aware of the pendency of this Longshore proceeding because its adjuster contacted a paralegal in Manzo's attorney's office and expressed her anger with Claimant for filing a Longshore claim when Zurich was already paying her state benefits. More importantly, Employer's and Carrier's *attorneys* were aware of the fact that there were two separate proceedings inasmuch as Mr. Griffis filed a motion to dismiss the state claim on August 19, 2003 *because* Manzo had filed for benefits under the LHWCA.[2] Inexplicably, they did not seek to dismiss this proceeding on the same ground. Indeed, according to Claimant, Employer and Carrier have ceased their payment

[2] Counsel for Employer and Carrier have argued, in part, that Zurich, as the carrier responsible for Longshore coverage in this case, has never had an opportunity to defend against this claim because Claimant's attorney knew, by virtue of the state worker's compensation proceeding, that Zurich was Carnival's carrier (*See, e.g.,* Tr. at 27-28). However, Employer's and Carrier's attorneys have never presented any evidence that Claimant's attorney was informed that Zurich was Carnival's carrier for both state worker's compensation claims and Longshore claims (Tr. 32-33). Nor have they ever explained why, given Carnival's contractual obligation pursuant to its insurance policy to notify Zurich of the Longshore claim, Carnival did not do so (Tr. 29-30, 95-96). In light of these omissions, as well as the fact that an employer may have separate carriers for state and federal claims, I find Claimant's failure to serve on Zurich copies of pleadings in this case was justified. Furthermore, Zurich, as discussed above, was clearly aware of the Longshore claim and simply took no action until October 3, 2003 when Ms. Torron-Bautista filed her appearance in the case on behalf of both Zurich and Carnival.

of state benefits,[3] and she would thus be prejudiced to the extent any award of compensation in her Longshore claim is delayed to accommodate Employer's and Carrier's request for additional time to present further evidence.[4] Reopening the record at this point would also consume substantial additional administrative resources associated with scheduling and conducing a second hearing in Orlando, Florida before the undersigned or another administrative law judge.

The reasons given by Employer and Carrier for their delay in defending this Longshore claim, all of which were completely within their own control, are both contradictory and wholly inadequate. Despite having been given ample time after the hearing to identify and interview employees who might have direct knowledge regarding the facts and circumstances surrounding when Carnival and Zurich first learned that Claimant had filed a Longshore claim, the only additional evidence submitted by Employer and Carrier to support their claim of "excusable neglect" was the Palenzuela affidavit. While I am not prepared to find that Carnival and Zurich acted in bad faith, their explanations of why they chose to do nothing with respect to this claim until two weeks before the scheduled hearing do not justify reopening the record to allow Employer and Carrier to submit additional evidence. Therefore, considering all relevant circumstances presented in the record before me, I find that Carnival and Zurich have failed to demonstrate their conduct was the result of "excusable neglect."

2. Motion to Dismiss.

Employer and Carrier have moved to dismiss Manzo's claim on two grounds: (1) She does not meet the "status" and "situs" requirements of the LHWCA; and (2) she is estopped from receiving federal Longshore benefits in light of her receipt of Florida state worker's compensation benefits. As explained below, the record before me establishes that Claimant is covered under the LHWCA with respect to her May 23. 2002 injury, and that she is not estopped from receiving Longshore benefits because she previously received state benefits for the same injury.

(a) "Status" and "Situs" Under LHWCA.

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[3] Claimant's attorney stated that Employer's and Carrier's motion to dismiss the state claim was denied (Tr. 31). Employer's and Carrier's counsel also stated that "Ms. Manzo has been receiving benefits under the State Act since the date of her accident" (Tr. 35). However, during her testimony, Claimant stated that state benefits, including medical care, were cut off approximately two months prior to the October 21, 2003 hearing (Tr. 48). In addition, the payout ledger submitted by Employer and Carrier reflects total temporary disability compensation and medical benefits only for May through December 2002 (EX 4). Since the statements of counsel are not evidence, the uncontradicted evidence (the testimony of Claimant and Zurich's payout ledgers showing payment of benefits only through December 2002) establishes that she is no longer receiving state workers' compensation benefits with respect to her May 23, 2002 injury.

[4] Employer and Carrier have stipulated that Claimant sustained a compensable injury on May 23, 2002, that the injury arose out of and in the course of her employment with Carnival, and that Carnival received timely notice of the injury (Tr. 20-21). Carnival and Zurich challenge Manzo's entitlement to Longshore benefits based only on the fact that she does not meet the "status" and "situs" requirements of the LHWCA and because she is estopped from receiving federal benefits by virtue of her receipt of state benefits. These arguments are discussed and rejected below.

Employer and Carrier assert that Claimant was performing work as a "ticket agent/sales" at the time of her May 23, 2002 injury, her work then was essentially "clerical" in nature, and she is thus not covered under the Act's definition of "maritime employee." Motion to Dismiss LS-18 and Employee's Claim ("Mot. to Dismiss") at 2. Carnival and Zurich also argue that the parking lot in which she was injured is not a covered "situs." *Ibid*. Claimant disputes this characterization of her duties as "clerical" and relies on her testimony and Carnival's admissions to establish both that she is covered by the LHWCA and the location of her injury on May 23, 2002 was part of Carnival's maritime facility (Tr. 34, CX 3 at ¶¶ 1, 6).

As explained below, I find that Claimant is covered under the Act with respect to the alleged injury. In doing so, however, I must first determine what effect, if any, to give to Employer's and Carrier's admissions regarding "status" and "situs."

In *Ramos v. Universal Dredging Corp.*, 10 BRBS 368 (1979), a majority of the Benefits Review Board ("Board") held that questions of status and situs involve the Board's subject matter jurisdiction and that these issues may therefore be raised at any time *sua sponte*. *Ibid*. Similarly, in *Erickson v. Crowley Maritime Corp.*, 14 BRBS 218 (1981), the Board held that parties' stipulations concerning coverage under the LHWCA are not controlling since subject matter jurisdiction cannot be waived. The Ninth Circuit, however, reversed the Board's *Ramos* decision. *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353 (9th Cir. 1981). The court held that questions of status and situs are factual issues which involve coverage under the LHWCA, not issues involving the power to adjudicate which are not dependent upon the state of the facts, *i.e.*, questions of "subject matter jurisdiction." *Id*. at 1357; *see also Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982) (reaffirming court's ruling in Ramos). The Fifth Circuit has also distinguished jurisdiction from coverage (status and situs). *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 810 n.2, 27 BRBS 103, 104 n.2 (CRT) (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994).

Since the issues of "status" and "situs" are factual in nature, they are properly the subject of a stipulation between the parties. In this case, Claimant alleged, and Employer and Carrier admitted,[5] that Manzo "comes under the Longshore & Harbor Worker's Compensation Act," and that her May 23, 2002 injury occurred "in the parking lot that was utilized by Carnival Cruise Lines for the purposes of unloading luggage from passengers[']vehicles in order that such luggage can be directly placed and loaded onto the cruise ship and this area was part of the overall maritime facility of the employer at Port Canaveral, Florida" (CX 3 at ¶¶ 1, 6). Based on these admissions, I find that Claimant was covered under the LHWCA at the time of her May 23, 2002 injury.

[5] OALJ's rules of practice provide, in relevant part, that any party may serve on any other party a written request for the admission of the truth of any specified relevant matter of fact, and that each matter for which an admission is requested is admitted unless, within thirty days after service of the request, the party to whom the request is directed serves on the requesting party a written denial, objection, or statement that the party cannot admit or deny the matter. 29 C.F.R. 18.20 (a)-(b) (2003). Since Carnival did not respond to the request for admissions served on it August 14, 2003 by Claimant, the matters of fact set forth therein are deemed admitted.

Even if Claimant's admissions were not sufficient, in and of themselves, to establish coverage in this case, Manzo's testimony at the formal hearing supports such a finding. Claimant testified that she was working for Carnival on May 23, 2002 when she slipped and fell in the parking lot which was "[d]irectly in front of the Carnival terminal" at Port Canaveral, Florida (Tr. 44, 47). The terminal building, which is a two- or three-story cement structure, sits adjacent to the water and passengers enter and exit Carnival's cruise ships via gangways that extend to the vessels from the terminal building (Tr. 45). Passengers who are in wheelchairs are met in the parking lot by Carnival employees, such as Manzo, and are escorted from the parking lot through the terminal building and onto the ships (Tr. 47). The lot is partially fenced in, and passengers park their vehicles and unload their luggage there before entering the terminal (Tr. 45-46). Passengers are subject to security checks as they enter the lot, they leave their vehicles there while aboard Carnival's cruise ships, and the lot is used exclusively by Carnival employees and passengers (Tr. 46, 51, 54-55).

With respect to her assigned duties, Claimant further testified that she assisted passengers onto Carnival's vessels, helped with check-in and baggage, reviewed documentation before passengers were permitted to board (*e.g.*, driver's licenses, birth certificates, passports), and prepared "A-passes" for passengers (plastic cards used as room keys which bear the passenger's photograph) (Tr. 48-50). Some of her duties involved the use of a computer terminal, but she would "rotate between different positions, different times" (Tr. 55-56). She further testified that "[y]ou rotated every week or every two weeks or something like that" (Tr. 57). According to Manzo, she was "basically . . . in charge of getting the passengers checked in, through the terminal, [and] on the ship" (Tr. 50). Claimant's duties took her aboard Carnival's cruise ships for a variety of reasons including taking key boxes to the purser's office, assisting passengers confined to wheelchairs in boarding and departing vessels,[6] and tracking down non-U.S. passengers on board the ships when problems were uncovered with their documentation after they had boarded (Tr. 49, 66-67, 74-77). She also ate lunch aboard the cruise ships on a daily basis (Tr. 51, 78).

The "status" requirement for maritime employees is set forth in Section 2(3) of the Act which provides, in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . .

[6] Claimant testified that she "worked wheelchairs where you're going on and off the ship several times a day" (Tr. 67, 75). On cross-examination, she testified that a job description for "Embarkation Representative" shown to her by Carnival's attorney differed from the one she received when she first began working for Carnival in that the job description shown to her did not include duties involving assisting passengers in wheelchairs (Tr. 71, 80-81). The job description for "Embarkation Representative" marked by Employer and Carrier as an exhibit prior to the hearing expressly states that the incumbent "[a]ssists/registers/escorts wheelchair and physically challenged guests onboard the ship in a sensitive, courteous, and professional manner" (Tr. 81, Ex 5 at 2). The exhibit was excluded from the record based on Claimant's objection that he had not been provided a copy of the document in conformance with the prehearing order (Tr. 17-19).

33 U.S.C. §902(3). In *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), the Court emphasized that Section 2(3) contains occupational, not geographical, requirements. Moreover, it does not enumerate all possible categories of maritime employment. A claimant may be covered under Section 2(3) either because the employee's work constitutes an occupation specifically enumerated in the Act or because the work falls within the general category of "maritime employment." *Id.* at 334 n.7. In *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989), the Supreme Court held that land-based claimants at a relevant situs, engaged in activity that is an integral or essential part of loading or unloading a vessel, are covered under the LHWCA. In *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977), the Supreme Court also determined that a claimant need not be engaged in maritime employment at the time of injury to be covered under the LHWCA. The Court noted that Congress never intended that a claimant "walk in and out of coverage" during a day's work. *Caputo*, 432 U.S. at 266 n.27.

There is no question that Manzo's work was an essential part of the loading and unloading process with respect to the passengers arriving and departing Port Canaveral on Carnival's cruise ships. Claimant's duties included assisting passengers with their documentation, generating "A-passes" for their use onboard the vessel, and accompanying passengers who were in wheelchairs on and off the ships. Manzo also went aboard the vessel to deliver key boxes to the purser's office and to eat meals provided by her employer on a daily basis. Without such personnel, it is difficult to imagine how the hundreds of passengers who typically board Carnival's cruise ships would ever make it on board in a timely and efficient manner. Claimant's employment was "clearly an integral part of the []loading process," *Caputo*, 432 U.S. at 271, 273, and she was thus engaged in "maritime employment" at the time of her injury. I find that she is therefore covered under Section 2(3) of the Act.

Furthermore, Employer's and Carrier's argument that Manzo is excluded from coverage as a "clerical worker" is directly refuted by the express language of the statute. The LHWCA excludes from coverage *only* those "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work . . . ." 33 U.S.C. § 902(3)(A); *see also* 20 C.F.R. § 701.301(a)(12)(iii)(A) (term does not include "[i]ndividuals employed exclusively to perform office clerical, secretarial, security, or data processing work . . ."). It is axiomatic when interpreting a statute that "a court must begin with the plain language of the statute." *United States v. Prather*, 205 F.3d 1265, 1269 (11th Cir.2000). The statutory provision thus expressly applies only to employees hired "exclusively to perform office clerical, secretarial, security, or date processing work." 33 U.S.C. § 902(3)(A); *see also Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (BRB Nos. 02-0414 and 02-0414A) (March 5, 2003) (upholding ALJ determination that employee working as a materials supply clerk in receiving area of warehouse did not work exclusively in "business office" and thus met "status" requirement).

While Manzo's job as an Embarkation Representative may have entailed some clerical functions, her job was obviously much broader than that and often took her aboard Carnival's cruise ships to escort passengers confined to wheelchairs, deliver key boxes to the purser's office, and to locate non-U.S. passengers when questions arose with respect to their documentation after they had boarded. She was thus not employed "exclusively" to perform clerical duties. Nor was the performance of her duties confined to "the administrative areas" of

Carnival's operations.[7] Nothing in Claimant's testimony suggests that her duties were performed in what might be considered a typical "office setting."[8] Manzo therefore satisfies the "status" requirement of the Act.

With respect to "situs," the LHWCA states:

> Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a). In *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), the court analyzed the parameters of "adjoining area." It wrote:

> Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near." "Adjoining" can mean "neighboring." To instill in the term its broader meaning is in keeping with the spirit of the congressional purposes. So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWCA.

Id. at 513-14. The situs inquiry looks to the nature of the place of work at the moment of injury. *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977). A site adjacent to navigable waters or in a neighboring area customarily used in loading or unloading a vessel satisfies the situs test even though it is not used exclusively for maritime purposes. *See Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998) (yards with a functional and geographical nexus to navigable waters that are used for loading vessels are sufficient to give Claimant situs); *see also Gavronic v. Mobil Mining and Minerals*, 33 BRBS 1 (1999) (geography of facility adjacent to docks where barges are loaded and unloaded and occurrence of significant maritime activity at that facility in the form of loading and unloading of barges sufficient to support conclusion that injuries occurred in a covered situs).

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[7] Even if resort to the Act's legislative history were necessary, which it is not, the legislative history regarding Section 2(3)(A) confirms that Congress intended to exclude only those employees who are "confined physically and by function to the administrative areas of the employer's operations." *Boone v. Newport News Shipbuilding and Dry Dock Co*., 37 BRBS at 3 *citing* 1984 U.S.C.C.A.N. 2734, 2737.

[8] For example, Manzo testified that when she was working with passengers "[t]he job was standing. When there were passengers coming, you stood" (Tr. 61). With respect to where she worked, she simply described the location as "at the top of the terminal" (Tr. 62). She further testified that when she was working "U.S. improper documents . . . you would log that in. Then, at the end of the day, you would take all the counts of who didn't have what, you'd make copies, give it to the supervisor, give it to the purser . . . if there was something that we – that was non-U.S., if there was something that we missed, we would have to go find the person on the ship to do that" (Tr. 65).

The parking lot in which Claimant was injured is unquestionably an area which adjoins the navigable waters utilized by Carnival's cruise ships. The lot sits directly in front of the terminal building through which passengers board and exit the vessels, it is partially fenced in, and it is used exclusively by Carnival's employees and passengers. I therefore find that it is a covered "situs" for purposes of the LHWCA.

(b) Estoppel.

According to Employer and Carrier, Claimant has filed petitions for benefits under Florida's worker's compensation statute, and she is therefore estopped from pursuing a claim for benefits under the Longshore Act. Mot. to Dismiss at 2, EX 2, 3. The Florida statue at issue provides, in relevant part:

> (1) The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment. . . .
>
> . . . .
>
> (2) Benefits are not payable in respect of the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's (sic) and Harbor Worker's Compensation Act, the Defense Base Act, or the Jones Act.

31 F.S. 440.09(1), (2). On October 3, 2002, Manzo filed a petition for benefits under this statute with respect to her May 23, 2002 injury (EX 2). Another petition for benefits under the statute was filed by Claimant on August 4, 2003 (EX 3). As noted previously, payout ledgers provided by Zurich show payment of compensation and medical benefits for the period May 23, 2002 through December 23, 2002 (EX 4).

It is well settled that the acceptance of payments under a state act does not constitute an election of remedies barring a subsequent claim under the LHWCA. *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 131 (1962); *Holland v. Harrison Bros. Dry Dock & Repair Yard*, 306 F.2d 369, 373 (5th Cir. 1962).[9] However, the adjudication of a state claim may implicate the rule of collateral estoppel if such a claim is later filed. Collateral estoppel, also referred to as "issue preclusion," is applied when: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a necessary part of the judgment in the prior proceeding; and (4) the prior judgment is final and valid. *See Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317 (1st Cir. 2001), *cert. denied*, 122 S.Ct. 1064 (2002); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000). Thus, collateral estoppel applies only after the entry of a final order that terminates the litigation between the same parties on the merits of the case. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); *St. Louis Iron Mountain & Ry. Co. v. Southern Express Co.*, 108 U.S. 24, 28-29 (1883).

[9] A claimant is not entitled to double recovery, and the Act expressly provides a statutory credit for any benefits previously received under a state worker's compensation claim arising from the same injury. 33 U.S.C. § 903(e).

Employer and Carrier have made no showing in this case that the issues sought to be precluded here are identical to any issue presented in the state claim for worker's compensation benefits. Indeed, at the October 21, 2003 hearing, their counsel acknowledged that Claimant was receiving benefits paid *voluntarily* by Zurich and that there had been no formal adjudication of her state worker's compensation claim (Tr. 35, 106-07).[10] Absent the issuance of a final order in that proceeding terminating the litigation between the parties, collateral estoppel simply does not apply to Manzo's Longshore claim.

3. Remand for Further Proceedings.

At the time of the formal hearing, Claimant requested that this claim be remanded to the district director for further proceedings after a determination was made with respect to the issues of "status" and "situs" (Tr. 12-13). Employer and Carrier similarly agreed at the hearing that "the crux of this case is jurisdiction[]" (Tr. 40). They in fact stipulated that Claimant and Employer were in an employee/employer relationship on May 23, 2002, the day that Manzo was injured, that the injury arose out of and in the course of Claimant's employment with Employer, that the injury was compensable, that Employer received timely notice of the injury, and that Employer made voluntary payments to Claimant under the state worker's compensation statute (Tr. 20, 22).

According to Claimant's testimony, she was treated for her injuries after her May 23, 2002 accident and informed that she had a herniated disk (Tr. 48). She received compensation and medical benefits for her injuries under the state worker's compensation statute until approximately two months before the October 21, 2003 hearing. *Ibid*. However, at that time, she was informed by Zurich's claims adjuster that benefits were being terminated because she had filed a claim under the LHWCA. *Ibid*. Her salary while working at Carnival was approximately $6.16 per hour, and she worked there three days a week, eight hours a day (Tr. 52, 62). During the time she was employed by Carnival, Claimant also worked part-time as a substitute teacher and Pizza Hut delivery person. *Ibid*. Her salary as a substitute teacher was approximately $6.33 per hour, and she worked approximately 24 hours per week in that job. *Ibid*. She returned to work at Carnival after her injury for approximately three months, and her supervisor provided her with a chair so she could sit down some of the time (Tr. 53, 61). However, her duties required that she stand when working with passengers, and she ultimately left Carnival because she wanted to find full-time employment where she was not required to stand most of the time (Tr. 61). She is presently working for the State of Florida, Department of Children and Families, as a data entry clerk where she is paid $8.83 per hour (Tr. 43).

The current record is devoid of any medical evidence upon which I might determine the nature and extent of Claimant's disabilities resulting from her May 23, 2002 injury. The parties also dispute, *inter alia*, Claimant's average weekly wage. In light of these deficiencies, I find

[10] In addition, Claimant's attorney asserted during the hearing that the presiding official in the state worker's compensation proceeding ruled that Manzo is *not* precluded from seeking Longshore benefits despite the fact that she has already received state benefits. However, no documentation supporting that allegation has been produced by Claimant's counsel, and the assertion has not been considered by me with respect to the issue of estoppel (Tr. 117).

that Claimant's request the case be remanded to the district director if she is found to meet the "status" and "situs" requirements of the Act should be granted. Therefore,

IT IS HEREBY ORDERED that Employer's and Carrier's motions for reconsideration and to dismiss are DENIED.

IT IS FURTHER ORDERED that this claim is remanded to the district director for further proceedings to allow the parties an opportunity to address the remaining issues in this claim.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.